IN THE COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE JURISDICTION

WRIT PETITION NO.1720 OF 1990

M/s.Basant Film Distributors and anr. ...Petitioners

vs.

Regional Director,

Employee's State Insurance Corpn. ...Respondents

D.A.Taur i/by.K.Ashar & Co.

for the petitioners.

H.V.Mehta for the respondents.

CORAM: S.C. DHARMADHIKARI, J.

23rd January, 2007.

P.C :-

1. By this petition under Article 226 of the Constitution of India, the petitioners are

challenging an order dated 21.9.1989 delivered by the Employees State Insurance Court, Bombay in Application (ESI) No. 110 of 1984.

2. This was an application under Section 75 of the Employees State Insurance Act, 1984 (hereinafter referred to as the 'ESI Act'). The petitioners sought a declaration from the ESI court that their establishment at Bombay cannot be termed as a "shop" and does not come within the purview of the notification issued by the Government of Maharashtra in exercise of its power under Section 1(5) of the ESI Act on 18.9.1978. It was therefore prayed that the petitioners establishment being not covered from 12.11.1978 it is not liable to pay the contributions and interest as demanded by the ESI authorities.

3. The grievance of the petitioners before the ESI court was that the first petitioner is a company incorporated and registered under the Indian Companies Act, 1956 having its registered office at the address mentioned in the cause title. It is a commercial establishment registered under the Bombay

Shops and Establishment Act. The first petitioner does not sell films to the theatres. Infact, it reserves playing time in the theatres on rental basis. The argument was that it was not rendering any service but it purchases exploitation rights of films from producers and exhibits them through various theatres in the city. It is not a shop but a purely commercial establishment.

4. It was contended that earlier the corporation accepted this position. Subsequently, they resiled from their earlier stand and took a decision to apply the ESI Act to the petitioner no.1 on the basis that it is a shop. The said decision is not in accordance with law. Apart from the plea of Estoppel being raised by the petitioners, additionally, it was contended that the petitioners cannot come within the purview of the Act. They have never engaged more than Nineteen (19) employees in the first petitioner company on any working day. However, letters of protest and clarifications were not accepted and ultimately the ESI authorities issued a show cause Notice dated 27.10.1983 calling upon the petitioners

to make payment of the contributions amounting to Rs.24,842.72/- for the period 12.11.1978 to 30.6.1983 on ad-hoc basis. The petitioners replied to this show cause notice on 12.12.1983 but the Assistant Regional Director (ESI) passed an order on 21.6.1984 purported under Section 45A of the ESI Act demanding from the petitioners the aforesaid sum alongwith interest for the abovementioned period. Before the ESI court several contentions were raised after the ESI Corporation filed its written statement denying the allegations made against it.

5. It is not in dispute before me that it was firstly contended that the petitioners establishment cannot be termed as a "shop" and therefore the Act would not apply. The second contention raised was that three Directors cannot be termed as employees within the meaning of the said term as defined under Section 2(a) of the ESI Act. The last contention was that the activities do not amount to a manufacturing process and therefore the ESI Act cannot be invoked. It was also urged that the ESI Authorities are Estoppel from applying the Act to the Petitioner

no.1.

6. The ESI court after holding that the establishment of the petitioners is a "shop" accepted the argument that its Directors cannot be termed as employees. However, the decision of the authority was upheld by observing that the petitioners can be termed as a "factory" within the meaning of the said term under Section 2(12) of the ESI Act. Similarly, by clubbing two units of the petitioners , it can be concluded that the requisite number of employees have been employed by them. For all these reasons, the decision of the ESI authorities was upheld and the application is dismissed.

7. The petitioners being aggrieved by the dismissal of their application have invoked this court’s jurisdiction under Article 226 of the Constitution of India.

8. Mr.Taur, learned advocate appearing for the petitioners has urged that considering the nature of the activities the establishment of the first

petitioner cannot be termed as a shop. He submits that the very concept which goes into an establishment being termed as a shop can have no application because the petitioners are not selling any goods nor rendering services. They are in the business of Exhibition of films which also is an activity undertaken by reserving a time slot for the persons who approach them. For reservation of such time slot, the petitioners purchase exploitation rights in films from producers. The films are then exhibited through various cinema theatres in Mumbai city. Such being the nature of activities, according to the Learned Advocate, the first petitioners cannot be termed as a "shop".

9. His second submission is that the term "employee" as been defined in Section 2(9) and it is an exhaustive definition. Any person employed for wages in or connection with the work of a factory or establishment to which the ESI Act applies and who is directly employed by the principal employer or any work of or incidental or preliminary to or connected with the work of the factory or establishment,

whether such work is done by the employee in the factory or establishment or elsewhere, or who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer can be termed as employee. He submits that the inclusive part of the definition would not apply to a case where the ESI court on materials produced observed that the Corporation has taken the number of employees as "twenty" (20) by including three Directors. Such Director of the first petitioner company cannot be termed as an employee of the first petitioner. He submits that after observing that there is substance in his contention and rejecting the stand of the Corporation in that behalf, it was not open for the ESI court to reject the application ultimately. He has invited my attention to paragraph 12 of the impugned order and has contended that it was not open for the ESI court to uphold the actions of the ESI authorities on the basis that the persons working at the godown of the petitioner no.1 can also be included within the definition of the term employee. Thus, the Mahim godown and the registered office at

Naaz Building are two separate entities and cannot be clubbed together for the purpose of computing the requisite number of employees. He submits that the godown at Mahim is used by a sister company also and therefore the approach of the ESI court was totally erroneous. In such circumstances, the order requires to be quashed and set aside. Mr.Taur, has placed reliance upon the decision of this court in Misc.Petition No. 181 of 1979 decided on 31.08.1982 and a decision of the Kerala High Court in Misc.First Appeal No. 565 of 1987 Regional Director, E.S.I. Corporation vs. Sarathi Lines (P) Ltd reported in 1998 (1)LLJ page 28.

10 On the other hand, Mr.Mehta appearing for the ESI Corporation, has contended that the issue raised in this petition is no longer res-integra. He submits that similar challenge by other establishments has failed. The notification is clear in as much as the schedule below, the same enlists the Classes of Establishment. The establishments wherein twenty or more than employees are employed on any day of the preceding twelve months are listed in

the schedule. the cinemas including preview theatres are mentioned separately so also shops. If the establishment of the petitioner no.1 is not a cinema or a preview theatre, it is not as if it is out of the purview of the notification altogether. Mr.Mehta, has relied upon the decisions of the Supreme Court and of this court holding that the provisions of the Act are beneficial in nature. It is social welfare legislation. This provisions must receive an interpretation which would advance its purpose and object and not defeat it. The term "shop" has been construed liberally with a view to extend the benefits under the Act to all employees. Hence, this argument of the petitioners be turned down.

11. The second submission is that the decision of the Kerala High Court wherein a view has been by the Kerala High Court that a partner cannot be said to be an Employee of the firm, can have no application because partnership firm and a limited company are two distinct entities in law. He submits that a view has been taken by the Hon’ble Supreme Court in the

case of ESIC v/s. Apex Engineering P.Ltd that even a Managing Director is an employee for the purposes of ESI Act. Such view has been taken considering the object and purpose of the Act. Therefore, no reliance can be placed on the decision of the Kerala High Court which otherwise also is distinguishable on facts. Mr.Mehta, submits that the evidence on record indicates that the godown premises so also the administrative office can be clubbed together. He has invited my attention to the statement of the witnesses examined on behalf of the petitioners and the discussion in that behalf in the impugned order.

12. For these reasons, Mr.Mehta's contention is that the view taken by the ESI court is a plausible view of the matter. It is based upon evidence and materials produced during the course of hearing. Such a view cannot be reversed on the basis that this a court of further appeal. Findings of facts are binding on this court and unless it is demonstrated that there are perverse and vitiated by errors apparent on the face of the record, they would require no interference under the writ jurisdiction.

13. With the assistance of the learned advocates appearing for both sides, I have gone through the petition and annexures thereto, so also the notification dated 18.9.1978. In the case of Cochin Shipping Company vs. ESI Corporation, A Three judge bench of the Supreme Court was considering an identical issue. This decision is reported in 1992 (4) SCC page 245. His Lordship S. Mohan, J speaking for the bench has held that the word "shop" cannot be construed narrowly. The said word has been construed and interpreted in several decisions of the Supreme Court to which a reference is made by Mohan, J. Ultimately, in para 21 and 22 this is what is observed.

> "21. In this case, the argument advanced on behalf of the appellant, is slightly different, namely other kinds of establishments which can easily fall within the definition of ‘shop’ have ben enumerated. Hence, a specific enumeration, so as to include the appellant’s business activity. , is to be insisted upon. In our considered view, this argument cannot be accepted. First of all, merely because other establishments which are akin to shop are enumerated, it does not, in any manner, oblige us to give a narrow meaning to the word ‘shop’ nor does it any way dilute the meaning of ‘shop’. As rightly contended by the learned counsel for the

> respondent , the object is to envelop as many establishments as possible without leaving any room for doubt. That is precisely what the notification intends to do.
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> 22. The appellant is carrying on stevedoring, clearing and forwarding operations. Clearing the documents, even if it be in the Custom House, is necessary for the export or import of goods. These services form part of the carrier's job. It cannot be gainsaid that he appellant is rendering service to cater to the needs of exporters and importers and others who want to carry the goods further. Therefore, it is a shop carrying on a systematic economic or a commercial activity. This would be enough to bring in the appellant without specifically enumerating the specific activities carried on by the appellant. Merely because the shop has been enumerated along with other similar establishments we do not think any further specific enumeration is necessary to cover the appellant. Thus we reject the contention raised on behalf of the appellant.

14. Cochin Shippng Company was a stevedoring, clearing and forwarding agent. After referring to the services rendered by it above conclusion has been reached by the Hon'ble Supreme Court.

15. I need not refer to the earlier decisions. Suffice it to state that the view taken by the Supreme court in Cochin Shipping Company has been consistently followed. In a latter decision reported

in AIR 1994 S.C. page 1154 Employees State Insurance Corporation V/s. R.K. Swamy and Ors, etc, the Supreme court concurred with the earlier view and has held that even an Advertising Agency is a "shop" for the purpose of the notification and the provisions of the ESI Act. The observations in Para 16 and 17 of this Judgement are eloquent enough.

16. There is no need to multiply decisions. Considering the purpose and the object of the Act so also the interpretation placed by the Hon'ble Supreme Court, in my view, it can safely be held that the first petitioners establishment is a shop for the purpose of above notification and consequently the ESI Act. As long as services are rendered from the first petitioner's establishment and the nature of the same are borne in mind, then it is not possible to accept the petitioner's contention that the notification would not apply to them. The Petitioner's Counsel does not dispute that the Establishment is a Commercial Establishment. He does not dispute that the Petitioners render services and cater to the needs of its customers. That is a

systematic Commercial Activity. Therefore, following the Supreme Court Decisions it must be held that the Establishment is a shop. The narrow view that a shop is a place where goods are sold is not accepted.

17. The view of the ESI court in so far as number of employees employed cannot also be faulted. When the ESI court rendered its decision it did not have the benefit of the latest view of the Supreme Court. The Hon'ble Supreme Court in ESIC V/s. M/s.Apex Eng.(P) Ltd (supra) had an occasion to consider the argument that a Managing Director of Private Limited company will not be covered by the definition of the term "employee" under the ESI Act. The matter was carried to Supreme court from some of the decisions rendered by this court. After referring to the several decisions in the field including the role of the Managing Director, the Supreme Court as observed as under :

> "15. The aforesaid decision of this court clearly rules that the Managing Director while acting as such can have dual capacity both as Managing Director on the one hand and as servant or employee of the company on the other. The Division Bench in the impugned

judgment with respect was in error in bypassing the ratio of the aforesaid decision of this court by observing that it was a judgment rendered under the Income Tax Act and therefore, it had no bearing on the scheme of the present Act. We also find that the Division Bench was equally in error when it placed reliance for its decision on the judgment of this court in the case of *Regional Director, Employees State Insurance Corporation, Trichur, vs. Ramanuja Match Industries (supra).* In the said decision a Bench of two learned Judges of this court held that a partner of a firm receiving salary is not an employee within the meaning of section 2, sub-section (9) of the Act. Ranganath Misra, J (as he then was), speaking for this court held that the partners cannot be held employees of the partnership firm. A partnership firm is not a legal entity and in a partnership firm each partner acts as an agent of the other. The position of a partner qua the firm is thus not that of a master and a servant or of a partner qua the firm is thus not that of a master and a servant or employer and employee which concept involved an element of subordination and not that of equality. The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm. It may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of the employees.

16. We fail to appreciate how these observations can ever be pressed in service on the facts of the present case. Respondent-company is not a partnership firm. It is a separate legal entity. It has chose one of its directors to act as Managing Director on payment of remuneration for the extra work to be done by him as such. He has

to discharge his functions as Managing Director under the supervision of the entire Board of Directors. Thus there is employer-employee relationship between two separate entities. On the one hand is the Managing Director employed as such and on the other the respondent-company being a separate legal entity which employs him.

. In this connection we may also usefully refer to a decision of this court in the case of *Bacha F. Guzdar vs. Commissioner of Income-Tax, Bombay (1955) 1 SCR 876.* A Constitution bench of this court speaking through Ghulam Hasan, J., brought out the clear legal distinction between a firm and a company by observing that the position of a shareholder of a company is altogether different from that of a partner of a firm. A company is a juristic entity from the shareholders but a firm is a collective name or an alias of all the partners. Of course the decision was rendered in the light of Income-tax Act wherein the question was whether agricultural income would include the dividend paid to a shareholder of a company.

17. It must, therefore, he held that the Managing Director of respondent-company could not be treated on par with partner of a partnership firm being given some remuneration for his extra work. The decision of this court in *Ramanuja Match Industries (supra)* was, therefore, clearly inapplicable to the facts of the present case and was erroneously pressed in service by the Division Bench of the High Court in the impugned judgment in deciding the appeal of the appellant-Corporation.

18. In my view, the Supreme Court having clarified

the matter beyond doubt that Private Limited Company cannot be equated with a partnership firm, it being a separate legal entity, then, such of the Directors who answer the definition of the term "employee" are liable to be included therein. In the present case applying the test laid down by the Hon'ble Supreme Court and the evidence before the ESI court it can safely be held that the three Directors of the first petitioner company are employees within the meaning of Section 2(9) of the ESI Act. The Kerala decision and the view taken therein apart from being no longer good law would also not apply on facts.

19. The view of the ESI court can be supported by taking into account the factual aspects as well. The ESI court has upheld the actions of the ESI authorities by observing that the requisite number of employees has been reached. In para 12 of the impugned order the learned Presiding Officer has made reference to an admission of the witness examined by the petitioners. In his cross-examination he states that the films are stored in the godown located opposite Shitaladevi Temple, Mahim, Bombay. This is

the only godown. The details of the employees working therein are also mentioned in the impugned order. Apart from this aspect the nature of the activities at the godwown have also been referred to. It is observed that three or four persons are working at the godown and taking into consideration these number as well as the number of persons employed at the registered office, it is held that the establishment is covered because it employs 20 or more persons.

20. Considering the nature of the activities and the material placed on record including the admissions of the witness examined by the petitioners, the conclusion drawn by the ESI court that the petitioners are employed more than 20 persons during the relevant period cannot be faulted.

21. It is not the argument of Mr.Taur, that the other conditions stipulated in the definition of the terms "Employee" are not satisfied in this case. That contention was based upon the fact that once the establishment is not a "shop" then the relevant

notification would not apply. However, once it is clear that Petitioner No.1 is an "establishment" to which the ESI Act applies and the requisite number of employees are found to be working, then, the decision of the ESI authorities to apply the Act to the petitioners cannot be said to be vitiated in any manner.

22. The argument of Estoppel which was canvassed before the ESI has been canvassed before me. There is no substance therein in as much as there cannot be any Estoppel against the law.

23. Therefore, the ESI court’s view in the present facts and circumstances cannot be said to be vitiated by any errors apparent or perverse so as to call for any interference in this court’s writ jurisdiction. I am in agreement with Mr.Mehta that the court has rightly applied the Notification in question to the petitioner no.1’s establishment. Consequently the challenge to the order of the ESI court fails. Rule discharged. No order as to costs.

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